

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAMES VICTOR MARTINEZ, §
TDCJ #1220481, §
§
Petitioner, §
§
v. § CIVIL ACTION NO. H-06-2978
§
NATHANIEL QUARTERMAN, Director, §
Texas Department of Criminal Justice - §
Correctional Institutions Division, §
§
Respondent. §

MEMORANDUM AND ORDER

The petitioner, James Victor Martinez (TDCJ #1220481), is a state inmate incarcerated in the Texas Department of Criminal Justice - Correctional Institutions Division (collectively, “TDCJ”). Martinez has filed a petition for a federal writ of habeas corpus under 28 U.S.C. § 2254, seeking relief from a state court conviction. After reviewing the pleadings and the applicable law under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, however, the Court concludes that this case must be **dismissed** for reasons set forth below.

I. BACKGROUND

Martinez indicates that he was convicted of aggravated robbery on March 3, 2004, by a jury in the 179th District Court of Harris County, Texas, in cause number 936141. Martinez received a forty-year prison sentence and a \$10,000 fine in that case. The conviction was affirmed by an intermediate state appellate court. *See Martinez v. State*, No.

01-04-00250-CR (Tex. App.— Houston [1st Dist.] July 21, 2005). Subsequently, the Texas Court of Criminal Appeals refused a petition for discretionary review on December 7, 2005.

Martinez now seeks a federal writ of habeas corpus to challenge the conviction under 28 U.S.C. § 2254. Martinez contends that he is entitled to relief for the following reasons: (1) his identification was obtained with an impermissibly suggestive line-up procedure; (2) testimony from an accomplice witness was not sufficiently corroborated; (3) the prosecutor improperly bolstered the accomplice witness's testimony; and (4) he was denied effective assistance of counsel at trial. Martinez concedes that the Texas Court of Criminal Appeals has not yet addressed these issues because he has only recently raised them in a state application for a writ of habeas corpus under Article 11.07 of the Texas Code of Criminal Procedure. Because the state's highest court of criminal jurisdiction has not yet completed its review of that application, the pending federal petition must be dismissed for reasons that follow.

II. EXHAUSTION OF REMEDIES

Under the applicable federal habeas corpus statutes, “[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A). Thus, a petitioner “must exhaust all available state remedies before he may obtain federal habeas corpus relief.” *Sones v. Hargett*, 61 F.3d 410, 414 (5th Cir. 1995). The exhaustion requirement “is not jurisdictional, but reflects a policy of federal-state comity designed to give the State an initial opportunity

to pass upon and correct alleged violations of its prisoners' federal rights." *Moore v. Quartermar*, 454 F.3d 484, 490-91 (5th Cir. 2006) (quoting *Anderson v. Johnson*, 338 F.3d 382, 386 (5th Cir. 2003) (internal citations and quotations omitted)). Exceptions exist only where there is an absence of available State corrective process or circumstances exist that render such process ineffective to protect the rights of the applicant. *See* 28 U.S.C. § 2254(b)(1)(B). A reviewing court may raise a petitioner's failure to exhaust *sua sponte*. *Tigner v. Cockrell*, 264 F.3d 521, 526 (5th Cir. 2001), *cert. denied*, 534 U.S. 1164 (2002).

To exhaust his state remedies under the applicable statutory framework, a habeas petitioner must fairly present "the substance of his claim to the state courts." *Moore*, 454 F.3d at 491 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 258 (1986)). A federal habeas petitioner shall not be deemed to have exhausted the remedies available in the state courts "if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(b)(1)(C). In Texas, a criminal defendant may challenge a conviction by taking the following paths: (1) the petitioner may file a direct appeal followed, if necessary, by a petition for discretionary review in the Texas Court of Criminal Appeals, and (2) he may also file a petition for writ of habeas corpus under Article 11.07 of the Texas Code of Criminal Procedure in the convicting court, which is transmitted to the Texas Court of Criminal Appeals once the trial court determines whether findings are necessary. *See* TEX. CODE CRIM. PROC. art. 11.07 § 3(c); *see also Myers v. Collins*, 919 F.2d 1074, 1076 (5th Cir. 1990) (discussing the paths of exhaustion in Texas).

According to the petition, Martinez only recently raised the questions presented for federal review in a state habeas corpus application under Article 11.07 of the Texas Code of Criminal Procedure that was filed on August 7, 2006. Martinez concedes that, to date, the Texas Court of Criminal Appeals has not issued a decision on that application. Thus, the pleadings plainly show that the Texas Court of Criminal Appeals has not yet had an opportunity to address the issues raised in the pending petition. Because this state process remains available, the petition is not exhausted and the petitioner does not satisfy any statutory exception to the exhaustion doctrine. Comity requires this Court to defer until the Texas Court of Criminal Appeals has addressed the petitioner's claims. It follows that the pending federal habeas petition must be dismissed as premature for lack of exhaustion.

III. CERTIFICATE OF APPEALABILITY

Because the habeas corpus petition filed in this case is governed by the Antiterrorism and Effective Death Penalty Act, codified as amended at 28 U.S.C. § 2253, a certificate of appealability is required before an appeal may proceed. *See Hallmark v. Johnson*, 118 F.3d 1073, 1076 (5th Cir.) (noting that actions filed under either 28 U.S.C. § 2254 or § 2255 require a certificate of appealability), *cert. denied sub nom. Monroe v. Johnson*, 522 U.S. 1003 (1997). “This is a jurisdictional prerequisite because the COA statute mandates that ‘[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals’” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citing 28 U.S.C. § 2253(c)(1)).

A district court may deny a certificate of appealability, *sua sponte*, without requiring further briefing or argument. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). Because the exhaustion prerequisite to federal habeas corpus review is well established, the Court concludes that jurists of reason would not debate whether the procedural ruling in this case was correct. Accordingly, a certificate of appealability will not issue in this case.

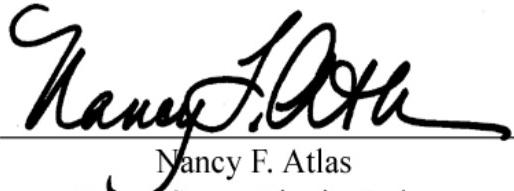
IV. CONCLUSION

For these reasons, the Court **ORDERS** as follows:

1. The petitioner's motion for leave to proceed *in forma pauperis* (Doc. # 2) is **GRANTED**.
2. The petition is **DISMISSED WITHOUT PREJUDICE** for failure of the petitioner to exhaust all available remedies on all his claims to the state's highest court of criminal jurisdiction as required by 28 U.S.C. § 2254.
3. A certificate of appealability is **DENIED**.

The Clerk will provide copies of this order to the parties.

SIGNED at Houston, Texas, on **September 25, 2006**.



Nancy F. Atlas
United States District Judge